PD-1042-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/13/2019 9:53 AM
Accepted 3/13/2019 3:21 PM
DEANA WILLIAMSON
CLERK

**NO. PD-1042-18**

**IN THE COURT OF CRIMINAL APPEALS OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
3/13/2019
DEANA WILLIAMSON, CLERK

**RUBEN LEE ALLEN**
*Appellant*
v.

**THE STATE OF TEXAS**
*Appellee*

---

On Petition for Discretionary Review from
Appeal No. 01-16-00768-CR
in the Court of Appeals, First District at Houston

Trial Court Cause No. 1487627
337th District Court of Harris County, Texas
Hon. Renee Magee, Judge Presiding

---

# APPELLANT'S REPY BRIEF REGARDING APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

---

**Alexander Bunin**
Chief Public Defender
Harris County, Texas

**Nicholas Mensch**
Assistant Public Defender
Harris County, Texas
State Bar of Texas No. 24070262
1301 Franklin, Suite 100
Houston, Texas 77002
Phone: (713) 368-0016
Fax: (713) 368-9278
nicholas.mensch@pdo.hctx.net

## IDENTITY OF PARTIES AND COUNSEL

| | |
|---|---|
| APPELLANT: | Ruben Lee Allen<br>TDCJ# 02090075<br>Ferguson Unit<br>12120 Savage Drive<br>Midway, Texas 75852 |
| DEFENSE COUNSEL AT TRIAL: | William Cheadle<br>State Bar of Texas No. 04162950<br>2308-C Avalon Place<br>Houston, Texas 77019 |
| COUNSEL ON APPEAL FOR APPELLANT: | Nicholas Mensch<br>State Bar of Texas No. 24070262<br>Assistant Public Defender<br>Harris County, Texas<br>1301 Franklin Street, Suite 100<br>Houston, Texas 77002 |
| TRIAL PROSECUTORS: | Amanda Petroff<br>State Bar of Texas No. 24071514<br>John Wakefield<br>State Bar of Texas No. 24054125<br>Assistant District Attorneys<br>Harris County, Texas<br>1201 Franklin, 6th Floor<br>Houston, Texas 77002 |
| COUNSEL ON APPEAL FOR THE STATE: | Clint Morgan<br>State Bar of Texas No. 24071454<br>Assistant District Attorney<br>Harris County, Texas<br>500 Jefferson Street, Suite 600<br>Houston, Texas 77002 |

| | |
|---|---|
| PRESIDING JUDGE: | Hon. Renee Magee<br>337th District Court<br>Harris County, Texas<br>201 Caroline, 11th Floor<br>Houston, Texas 77002 |

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

**Cases:**



**Statutes**

**Rules**



**Secondary Sources**

**TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:**

Pursuant to Rules 38.3 and 70.4 of the Texas Rules of Appellate Procedure, Appellant, Ruben Lee Allen, submits this reply to the State's brief.

## REPLY ARGUMENTS

### 1. *Peraza* and *Salinas* did expand the realm of permissible court costs that can be assessed against a criminal defendant to include court costs that are not "necessary" or "incidental" to the trial of a criminal case. However, a statute that assesses any type of court cost must provide for an allocation of the fees collected to be expended towards a legitimate criminal justice purpose.

The State contends that "[t]he First Court, on rehearing, recognized the conundrum created by applying the *Peraza-Salinas* rule to recoupment costs and sough to figure out this Court's real intentions." (State's Response at 13). In order to do this, "[t]he First Court looked at the language in *Peraza* describing the *Carson* rule as "too limiting" and then determined that "because the point of *Peraza* was to expand the realm of permissible court costs, costs that were permissible under *Carson* would be permissible." (State's Response at 14).

Appellant notes that the State, in its argument, appears to concede that this Court never expressly stated that *Peraza* created two categories of permissible court costs; one for recoupment costs and one to off-set future expenses. Furthermore, the interpretation by the First Court of Appeals that the State relies upon is not reflected in what this Court wrote in *Peraza*:

> We continue to hold, as we did in *Weir*, that court costs should be related to the recoupment of costs of judicial resources. However, we must revisit whether *Carson*'s requirement—that such costs be "necessary" and "incidental" to the trial of a criminal case—is still a proper standard for assessing whether a court cost assessed against a criminal defendant is constitutionally valid. The terms "necessary" and "incidental" are commonly used and easily understood words; however, we find that they are too limiting to continue to be the litmus test. In the 73 years since *Carson* was decided, the prosecution of criminal cases and our criminal justice system have greatly evolved. Our legislature has developed statutorily prescribed court costs with the intention of reimbursing the judicial system for costs incurred in the administration of the criminal justice system. To require such costs to be "necessary" or "incidental" to the trial of a criminal case in order to be constitutionally valid ignores the legitimacy of costs that, although not necessary to, or an incidental expense of, the actual trial of a criminal case, may nevertheless be directly related to the recoupment of costs of judicial resources expended in connection with the prosecution of criminal cases within our criminal justice system.
>
> We therefore reject *Carson*'s requirement that, in order to pass constitutional muster, the statutorily prescribed court cost must be "necessary" or "incidental" to the "trial of a criminal case." We hold that, if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the separation of powers clause. A criminal justice purpose is one that relates to the administration of our criminal justice system. Whether a criminal justice purpose is "legitimate" is a question to be answered on a statute-by-statute/case-by-case basis.

*Peraza v. State*, 467 S.W.3d 508, 517 (Tex. Crim. App. 2015)

Nothing in *Peraza* leads to the suggestion that this court divided court costs into two categories "(1) court cost to reimburse criminal justice expenses incurred in connection with that criminal prosecution and (2) court costs to be expended in the future to off-set future criminal justice costs" with the former not needing the fees

collected to be statutorily allocated towards a legitimate criminal justice purpose. *Allen v. State*, No. 01-16-00768-CR, 2018 Tex. App. LEXIS 7216 at *15-17 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. granted) (op. on reh'g) (designated for publication).

Appellant contends that this Court in *Peraza* reaffirmed that "court costs should be related to the recoupment of judicial resources." *Peraza*, 467 S.W.3d at 517. This Court further found that *Carson*'s standard for determining the constitutionality of a court cost, "that such cost be 'necessary' and 'incidental' to the trial of criminal case" to be "too limiting." *Id.* The *Carson* test was too limiting because it "ignore[d] the legitimacy of costs that, although not necessary to, or an incidental expense of, the actual trial of a criminal case, may nevertheless be directly relate to the recoupment of costs of judicial resources expended in the connect with the prosecution of criminal cases within our criminal justice system." *Id.* Based upon these findings, this Court "reject[ed] *Carson*'s requirement[s]"…and "held that, if the statute under which court costs are assessed (or an interconnect statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will render the courts tax gatherers in violation of the separation of powers clause." *Id.* When read as a whole, the holding in *Peraza* demonstrates that this Court did not divide court costs into two different types. Thus, the central question in determining the constitutionality of a court cost is whether the statute (or an interconnected statute) directs the funds collected to be allocated to be

expended for a legitimate criminal justice purpose. This standard applies to all court costs and does not hinge on whether the court cost is for a recoupment of expenses related to a criminal defendant's trial or any other type of cost.

Under the First Court of Appeals reasoning, a so-called reimbursement court cost could be allocated for any potential non-criminal justice purpose as there would be no requirement that the fee collected be allocated towards a legitimate criminal justice purpose. This interpretation proposed by the First Court of Appeals is inconsistent with the concerns expressed by this Court in *Salinas* regarding the judiciary becoming "tax gatherers" and would allow those concerns to come to fruition. See *Salinas v. State*, 523 S.W.3d 103, 109, fn. 26 (Tex. Crim. App. 2017). Furthermore, under the First Court of Appeals interpretation, reimbursement court costs do not need statutory language allocating the fees to be expended for a legitimate criminal justice, but if a court cost statute collects funds to be expended to offset criminal justice costs in the future, this type of court cost statute does require this statutory allocation language. The First Court of Appeals interpretation of *Peraza* then raises a question: how does the fact a court cost is for the reimbursement of criminal justice expenses incurred in connection with that criminal prosecution in-of-itself cure a potential separation of powers violation when in the case of a court cost statute for future expenses not having statutory language allocating the fees collected to expended for legitimate criminal justice purposes, a separation of powers violation is triggered? Only the court costs statute that offset future costs would be held to

violate the Separation of Powers clause even though the same deficiency is present, i.e. no statutory language directing the fees collected to be allocated towards a legitimate criminal justice purpose. This result doesn't make any sense and would lead to the absurd result of the judiciary being a "tax gatherer" for one type of court cost and not for the other. Neither the State or the First Court of Appeals have answered this question.

The State also faults the Appellant for not arguing "why the novel *Peraza-Salinas* rule should apply to recoupment court costs that have been of unquestioned validity for nearly two centuries." (State's Response at 16). However, Appellant has responded to this contention in his response to the State's Brief on the Merits Regarding its PDR. (Appellant's Response at 4-26). Suffice it to say, Appellant contends this Court's recent court costs cases are consistent with the interpretation of the Separation of Powers clause throughout the history of Texas jurisprudence. Furthermore, this Court has noted that "the usurpation of power will not receive sanction by reason of a long and unprotested continuation." *Meshell v. State*, 739 S.W.2d 246, 252, fn. 8 (Tex. Crim. App. 1987) (speedy trial act declared unconstitutional as a violation of separation of powers "nearly ten years after the promulgation of the Act"), citing *Rochelle v. Lane*, 105 Tex. 350 148 S.W. 558 560 (Tex. 1912) ("it should be known in Texas that a disregard of the Constitution by the usurpation of power on the part of officials is not sanctified by its long continuance, and that each officer confine his acts to the limits of his power.").

**2. Contrary to the State's argument, the *Peraza-Salinas* rule does not create a presumption of unconstitutionality.**

Using this case an example, the State for the first time on appeal contends that this Court's decisions in *Peraza* and *Salinas* creates a presumption of unconstitutionality. (State's Response at 17-20). In support of their argument, the State contends that the Appellant relied exclusively upon a report from the Office of Court of Administration ("OCA") in arguing that the summoning witness/mileage fee was facially unconstitutional. (State's Response at 18).[1] The State also argues that the same report was the basis for the First Court of Appeals opinion on original submission in declaring the summoning witness/mileage fee facially unconstitutional. (State's Response at 18). The State is mistaken. Although the Appellant did refer to the OCA report as supporting the proposition that the fees collected from the summoning witness/mileage fee were directed to the general revenue fund, Appellant specifically pointed out that "the $200 collected is not directed to any particular fund that is to be used to reimburse the Sheriff's Office for their subpoenas." (Appellant's Supplemental Brief at 6). Furthermore, on original submission, the First Court of Appeals summarized Appellant's contention as:

> Appellant argues that the $200 "Summoning Witness/Mileage" fee assessed against him, an indigent criminal defendant, by the trial court, violates the Separation of Powers clause of the Texas Constitution and constitutes an impermissible tax collected by the judiciary because "the

[1] Texas Office of Court Administration, Study of the Necessity of Certain Court Coasts and Fees in Texas, September 21, 2014. http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf (last visited March 12, 2019).

> funds" received for the fee are "not directed by statute to be used for a criminal justice purpose." Instead, "the funds" are "directed towards the general revenue fund of the county" "in which the convicting court is located."

*Allen v. State*, No. 01-16-00768-CR, 2017 Tex. App. LEXIS 11015 at *14-15 (Tex. App.—Houston [1st Dist.] Nov. 28, 2017)

Clearly, on original submission, the First Court of Appeals understood the substance of what the Appellant was contending and at no point did the First Court of Appeals complain that the Appellant inadequately briefed his argument. See TEX. R. APP. P. 38.1(i).[2] Appellant also notes that the First Court of Appeals provided the State with an opportunity to respond to the Appellant's supplemental brief, but the State did not file a response. If they had concerns regarding the Appellant's supplemental brief, the State had an opportunity to raise them.

Furthermore, the First Court of Appeals did not rely "exclusively on the OCA Report for its conclusion that the witness summoning fee went to a county's general fund." (State's Response at 18). Although, the First Court of Appeals did cite to the OCA Report, and a prior decision regarding the $25 prosecutor's fee, in its opinion on original submission, the First Court of Appeals noted that the summoning witness/mileage fee "statute does not [actually] state where the [funds received from the] fee [are] to be directed." *Allen*, 2017 Tex. App. LEXIS 11015 at *23, citing TEX. CODE OF CRIM. PROC. ART. 102.011(a)(3), (b) and *Hernandez v. State*, 562 S.W.3d 500

[2] Undersigned counsel admits that he could have presented his argument in a clearer fashion and not relied upon the OCA report as much as he did. Undersigned counsel believes he has rectified those mistakes with his briefing in this Court.

(Tex. App.—Houston [1st Dist.] 2017, pet. filed). After discussing the OCA report, the First Court of Appeals, on original submission, stated:

> Thus, in this case, as in *Hernandez* and *Salinas*, "the constitutional infirmity" is article 102.0111(a)(3) and (b)'s "failure to *direct* the funds [received from the "Summoning Witness/Mileage's fee] to be used in a manner that would make [them] a court cost (i.e. for something that is a criminal justice purpose)."
>
> …
>
> We conclude, as we did in *Hernandez*, that article 102.011(a)(3) and (b) do not direct the funds received from the "Summoning Witness/Mileage" fee to be expended for a criminal justice purpose.

*Allen*, 2017 Tex. App. LEXIS 11015 at *24 (citations omitted).

Similarly, in his dissenting opinion on rehearing, Justice Jennings noted that "after *Salinas*, to avoid being declared facially unconstitutional, in violation of the Separation of Powers clause of the Texas Constitution, a statute that imposes a court cost on a criminal defendant must direct "that the funds [collected pursuant to that statute] be used for something that is a legitimate criminal justice purpose." *Allen v. State*, No. 01-16-00768-CR, 2018 Tex. App. LEXIS 7216 at *43 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. filed) (op. on reh'g) (designated for publication) (Jennings, J., dissenting), citing *Salinas*, 523 S.W.3d at 109 at fn. 26, 110 at fn. 36 and *Peraza*, 467 S.W.3d at 517-518. In reviewing the text of the statute, Justice Jennings noted that "the statute *does not* actually state where the funds received from criminal defendant for the "Summoning Witness/Mileage" fee are to be directed." *Id.* "Under such circumstance, the funds collected pursuant to article 102.011(a)(3) and (b) end up

in the general fund of the county in which the convicting court serves or the general fund of the State." *Id.* at 44. In fact, Justice Jennings responds directly to the accusation that he is relying exclusively on the OCA report:

> Although the majority concludes that the Office of Court Administration's website has "limited value," the majority does not assert that the information from the website is inaccurate. Further, article 102.011(a)(3) and (b) are not facially unconstitutional because of the information contained on the Office of Court Administration's website. Instead, as explained above, in order to pass muster under the Separation of Powers clause of the Texas Constitution, article 102.011(a)(3) and (b), or an interconnected statute, must direct that the funds collected from criminal defendants for the "Summoning Witness/Mileage" fee be expended for something that constitutes a legitimate criminal justice purpose. Here, the statute simply does not do that; it does not state where the funds collected for the "Summoning Witness/Mileage" fee are to be directed. Accordingly, the funds collected pursuant to article 102.011(a)(3) and (b) are deposited in the county's general fund or the State's general fund to be used for any legal purpose. *This* is what renders the statute unconstitutional.

*Allen*, 2018 Tex. App. LEXIS 7216 at *46 at fn. 13 (Jennings, J., dissenting)

Thus, neither the Appellant nor the dissenting justice relied exclusively on the OCA report to support the assertion that the summoning witness/mileage statute was facially unconstitutional.

Also, in Appellant's response to the State's motion for *en banc* reconsideration, Appellant again pointed out that the summoning witness mileage statute was silent as to where the fees collected are directed and cited to attorney general opinions that addressed similar statutes and concluded that the funds collected went to the general revenue fund. (Appellant's Response to State's Rehearing at 10-12). Appellant also

addressed the State's contention that an interconnected statute provided for the allocation for funds collected for the summoning witness/mileage statute towards a legitimate criminal justice purpose. (Appellant's Response to State's Rehearing at 12-16).[3]

The State also argues that "the constitutionality of a statute should not depend on whether the statute's defender is willing and able to do an amount of research that is, in light of the sums involved, objectively unreasonable." (State's Response at 19), citing and comparing *Tyler v. State*, 563 S.W.3d 493, 503 (Tex. App.—Fort Worth 2018, no pet) (upholding $25 prosecutor's fee as constitutional based on "painstaking review of the interrelated statutes that direct the $25 ultimately to payment of the prosecutor's salary") with *Hernandez*, 562 S.W.3d at 510-511 ($25 prosecutor's fee unconstitutional in violation of the Separation of Power clause). To the extent that the State's contention could be read as a defendant's counsel not having to do the same amount of work, i.e. determining whether there is a potential interconnected statute allocating funds when the controlling statute is silent, this Court should reject that premise. Furthermore, while the State may view an attack on a $25 or $200 court cost as not worthy of their time, it may mean a whole lot to the convicted criminal defendants who are often some of the poorest members of society. Appellant also

[3] Appellant also addressed the issue of whether or not an interconnected statute provides for an allocation of the funds collected to be used for a legitimate criminal justice purpose in his brief on the merits in this Court. (Appellant's Brief at 19-23). While in its response the State points out it made an argument demonstrating that the summoning witness/mileage has an interconnected statute that allows for an allocation towards a legitimate criminal justice purpose on rehearing, the State does not directly respond to Appellant's contention regarding the flaw in that argument.

notes that while the individual court costs may seem low, as the State alludes to in its brief on the merits regarding its PDR, the amounts collected statewide from individual criminal defendants can add up to quite a lot of money. See (State's Brief on the Merits Regarding its Cross-PDR at 53 and Appellant's Response to State's Cross-PDR at 33-34) (over $100 million dollars in court costs collected pursuant to the Consolidated Court Cost statute may have been collected in Fiscal Year 2017).

Finally, this Court and other courts have utilized the *Peraza-Salinas* standard, placing the burden on the party challenging the court cost in determining the constitutionality of a court cost. See *Peraza*, 467 S.W.3d at 518-522, *Salinas*, 523 S.W.3d at 106-110. See also *Alvarez v. State*, 02-18-00193-CR, 2019 Tex. App. LEXIS 1567 at *8-12 (Tex. App.—Fort Worth Feb. 28, 2019, no pet. h.) (designated for publication) (determining an interconnected statutory scheme allocates funds from jury fee under Article 102.004(a) to a legitimate criminal justice purpose) and *Casas v. State*, 524 S.W.3d 921, 925-928 (Tex. App.—Fort Worth 2017, no pet.) (review of statutory scheme used to determine "emergency-services cost" under Article 102.0185 violated Separation of Powers clause and was facially unconstitutional). Thus, the *Peraza-Salinas* rule does not create a presumption of unconstitutionality.

## PRAYER

Appellant, Ruben Lee Allen, prays for this Court to reverse the First Court of Appeals' judgment, declare the summoning witness/mileage fee facially unconstitutional in violation of the Separation of Powers clause under the Texas Constitution, and modify the trial court's judgment to delete the $200.00 fee from the bill of costs. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

**Alexander Bunin**
Chief Public Defender
Harris County Texas

/s/ Nicholas Mensch
**Nicholas Mensch**
Assistant Public Defender
Harris County, Texas
State Bar of Texas No. 24070262
1201 Franklin, 13th floor
Houston, Texas 77002
Phone: (713) 368-0016
Fax: (713) 368-9278
nicholas.mensch@pdo.hctx.net

**Attorney for Appellant**
**Ruben Lee Allen**

## CERTIFICATE OF SERVICE

I certify that a copy of Appellant's Reply Brief Regarding the Appellant's Petition for Discretionary Review was served on Clint Morgan of the Harris County District Attorney's Office and Stacey Soule of the Office of State Prosecuting Attorney on March 13, 2019 to the email addresses on file with the Texas e-filing system.

/s/ Nicholas Mensch
**Nicholas Mensch**

## CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4, I certify that this computer-generated document complies with the typeface requirements of Rule 9.4(e). This document also complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i) because this petition contains 3194 words (excluding the items exempted in Rule 9.4(i)(1)).

/s/ Nicholas Mensch
**Nicholas Mensch**